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Report of Working Group V (Insolvency Law) on the work of its fifty-ninth session (Vienna, 13–17 December 2021)

Contents

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I. Introduction

1. At its fifty-ninth session, the Working Group finalized its work on a legislative guide on insolvency law for micro- and small enterprises and took up two new topics referred to it by the Commission (civil asset tracing and recovery and applicable law in insolvency proceedings).[1] Background information on each of those topics may be found in document A/CN.9/WG.V/WP.173.

II. Organization of the session

2. In accordance with the decision of the Commission at its fifty-fourth session,[2] Working Group V, which was composed of all States members of the Commission, held its fifty-ninth session from 13 to 17 December 2021. The session was organized in accordance with the arrangements for the sessions of UNCITRAL working groups during the coronavirus disease (COVID-19) pandemic as contained in documents A/CN.9/1078 and A/CN.9/1038 (annex, I) extended by the decision of the Commission until its fifty-fifth session.[3] Arrangements were made to enable delegations to participate remotely as well as in person at the Vienna International Centre.

3. The session was attended by representatives of the following States members of the Working Group: Algeria, Argentina, Australia, Austria, Belarus, Belgium, Brazil, Canada, Chile, China, Colombia, Côte d'Ivoire, Croatia, Czechia, Dominican Republic, Ecuador, Finland, France, Germany, Hungary, India, Indonesia, Israel, Italy, Japan, Kenya, Lebanon, Malaysia, Mali, Mauritius, Mexico, Peru, Poland, Republic of Korea, Russian Federation, Singapore, South Africa, Spain, Sri Lanka, Switzerland, Thailand, Turkey, Uganda, Ukraine, United Kingdom of Great Britain and Northern Ireland, United States of America, Viet Nam and Zimbabwe.

4. The session was attended by observers from the following States: Armenia, Bahrain, Bulgaria, Burkina Faso, Denmark, El Salvador, Greece, Guatemala, Jordan, Kuwait, Latvia, Lithuania, Madagascar, Maldives, Malta, Morocco, Nepal, Netherlands, Oman, Panama, Portugal, Qatar, Republic of Moldova, Sierra Leone, Slovakia, Slovenia and Tunisia.

5. The session was also attended by observers from the Holy See and the European Union.

6. The session was also attended by observers from the following international organizations:

(a) *Organizations of the United Nations system*: International Monetary Fund and the World Bank Group;

(b) *Invited international governmental organizations*: Gulf Cooperation Council, Hague Conference on Private International Law, International Association of Insolvency regulators (IAIR) and International Institute for the Unification of Private Law (Unidroit);

(c) *Invited international non-governmental organizations*: Allerhand Institute, American Bar Association (ABA), Barreau de Paris, Center for International Legal Studies (CILS), China Council for the Promotion of International Trade (CCPIT), Conference on European Restructuring and Insolvency Law (CERIL), European Law Institute (ELI), Fondation pour le Droit Continental (FDC), INSOL Europe, INSOL International, International Bar Association (IBA), International Credit Insurance and Surety Association (ICISA), International Insolvency Institute (III),

[1] For the mandate given to the Working Group by the Commission as regards those three items, see *Official Records of the General Assembly, Seventy-sixth Session, Supplement No. 17* (A/76/17), para. 76 (c), para. 77 (the decision of the Commission, paras. 3 and 4) and para. 217.

[2] Ibid., para. 389.

[3] Ibid., para. 248.

International Swaps and Derivatives Association (ISDA), International Women's Insolvency and Restructuring Confederation (IWIRC), Kozolchyk National Law Center (NatLaw), Law Association for Asia and the Pacific (LAWASIA), Moot Alumni Association (MAA), PRIME Finance Foundation, Union Internationale des Avocats (UIA) and Union Internationale des Huissiers de Justice et officiers judiciaires (UIHJ).

7. In accordance with the arrangements for the sessions of UNCITRAL working groups during the COVID-19 pandemic as contained in documents A/CN.9/1078 and A/CN.9/1038 (annex, I) extended by the decision of the Commission until its fifty-fifth session (see para. 2 above), the following persons continued their respective offices:

Chairman: Mr. Xian Yong Harold Foo (Singapore)

Rapporteur: Ms. Jasnica Garašić (Croatia)

8. The Working Group had before it the following documents:

(a) Annotated provisional agenda (A/CN.9/WG.V/WP.173);

(b) Note by the Secretariat: draft legislative guide on insolvency law for micro- and small enterprises (A/CN.9/WG.V/WP.174);

(c) Note by the Secretariat: civil asset tracing and recovery in insolvency proceedings (A/CN.9/WG.V/WP.175); and

(d) Note by the Secretariat: applicable law in insolvency proceedings (A/CN.9/WG.V/WP.176).

9. The Working Group adopted the following agenda:

1. Opening of the session.
2. Adoption of the agenda.
3. Finalization of a draft legislative guide on insolvency law for micro- and small enterprises.
4. Consideration of legal issues arising from civil asset tracing and recovery in insolvency proceedings.
5. Consideration of the topic of applicable law in insolvency proceedings.
6. Other business.

III. Deliberations

10. The Working Group commenced its work with the review of the revised draft commentary to the *UNCITRAL Legislative Recommendations on Insolvency of Micro- and Small Enterprises*[4] found in document A/CN.9/WG.V/WP.174. The summary of deliberations of the Working Group on the draft commentary may be found in chapter IV below. Upon approval of the commentary as amended at the session, the Working Group, in accordance with the mandate given to it by the Commission,[5] considered the text final. It requested the Secretariat to publish the commentary together with the *UNCITRAL Legislative Recommendations on Insolvency of Micro- and Small Enterprises* with the title and in the style and in the form that had already been decided by the Commission (see paras. 17 and 18 below).[6]

11. The Working Group commenced its initial consideration of two new topics (see para. 1 above) on the basis of the notes by the Secretariat (A/CN.9/WG.V/WP.175 and A/CN.9/WG.V/WP.176). The summary of deliberations of the Working Group on

[4] Ibid., para. 77 and annex II.
[5] Ibid., para. 77 (the decision of the Commission, para. 4).
[6] Ibid., paras. 74 and 76 (d), (e) and (f).

the topic of civil asset tracing and recovery in insolvency proceedings may be found in chapter V below. The summary of deliberations of the Working Group on the topic of applicable law in insolvency proceedings may be found in chapter VI below.

IV. Finalization of a draft legislative guide on insolvency law for micro- and small enterprises (A/CN.9/WG.V/WP.174)

12. The Working Group had before it a draft legislative guide on insolvency law for micro- and small enterprises (A/CN.9/WG.V/WP.174). As requested by the Commission, the Working Group proceeded with the finalization of the text, limiting review to the new text found in the draft commentary.

13. Except for paragraphs 114, 149–150, 167, 302 and 303, no comments were made with respect to the draft text. With respect to paragraph 114, the secretariat was requested to clarify a link between the last sentence and the rest of that paragraph. With respect to paragraphs 149–150, a concern was expressed that they were drafted in a way that conveyed additional recommendations and caused inconsistency with paragraph 169. The Working Group approved those paragraphs unchanged. With respect to paragraph 167, a query was raised about a reference to the debtor's approval in that paragraph. The Working Group approved the paragraph unchanged. With respect to paragraph 302, the secretariat was requested to correct a cross reference to recommendation 75 found there.

14. With respect to paragraph 303, the Working Group received the proposal from the United Kingdom, the United States and the World Bank Group to replace the content of that paragraph with the following wording:

> "Bearing in mind the importance of establishing a simplified and efficient insolvency process for MSEs, while at the same time providing for the protection of the rights of all parties in interest, the MSE Insolvency Guide seeks to achieve the proper balance of the competing goals of (a) a deemed approval approach which aims both to expedite the reorganization process and to address the issue of the non-participation of creditors and (b) the importance of creditor votes on a reorganization plan submitted for approval. While the deemed approval process recommended by this MSE Insolvency Guide includes necessary creditor safeguards, it presumes an institutional capacity and legal infrastructure sufficient to monitor creditor participation appropriately. Where States are concerned that their creditor safeguards or institutional capacity and legal infrastructure may be insufficient to protect the rights of all parties in interest in their jurisdiction, States may consider whether compulsory creditor voting procedures are necessary to protect sufficiently those rights in some or all of their MSE insolvency cases. Such voting procedures are addressed in the recommendations of the revised World Bank Principles for Effective Insolvency and Creditor/Debtor Regimes regarding MSE insolvency.* The World Bank Principles recommend that when some form of creditor voting with majority approval is required, States should consider having absent votes or abstentions count as votes in favour of a reorganization plan in a simplified insolvency proceeding. They also recommend that insolvency laws should simplify voting procedures, including using electronic means where appropriate.
>
> * The World Bank Principles for Effective Insolvency and Creditor/Debtor Regimes (2021), footnote 25 and Principle C19.7. Footnote 25 of the World Bank Principles provides that Principle C14 applies in simplified MSE insolvency proceedings, and that 'acceptance of the plan by a majority of impaired creditors should be required.' In addition, Principle C19.7 provides, inter alia, that 'creditors silence or lack of negative vote on a duly notified reorganization plan should be considered as acceptance of the plan and counted as an affirmative vote.'"

15. In support of the new text, it was explained that it achieved a better balance among various policy considerations involved in determining the suitability of the deemed approval mechanism, and the alternatives where deemed approval might not

be suitable. It was in particular considered important for policymakers to assess the institutional capacity in their jurisdictions when deciding whether to implement a deemed approval mechanism, and the new wording appropriately brought that point to their attention.

16. The Working Group approved paragraph 303 as amended. A suggestion to delete the following sentence "While the deemed approval process recommended by this MSE Insolvency Guide includes necessary creditor safeguards, it presumes an institutional capacity and legal infrastructure sufficient to monitor creditor participation appropriately." did not receive support.

17. The Working Group recalled that the Commission, at its fifty-fourth session, in 2021, requested the Working Group to decide whether the approved text should be considered final or should be transmitted for finalization and adoption by the Commission at its next session, in 2022.[7] Pursuant to that request, the Working Group discussed the matter and agreed that the text as approved by the Working Group at the current session should be considered final and should not be referred for adoption by the Commission at its fifty-fifth session in 2022. The importance of finalizing and publishing the text so that States could start using it as soon as possible was emphasized, especially under current circumstances when MSEs worldwide faced financial difficulties, and States took measures to address them. A different view on referral of the text for finalization and adoption by the Commission at its next session, in 2022, was noted.

18. The Working Group requested the secretariat to publish the consolidated text as had been envisaged by the Commission.[8] It was considered that the Commission, and subsequently the General Assembly might wish in due course to acknowledge the finalization of the text by the Working Group.

V. Consideration of legal issues arising from civil asset tracing and recovery in insolvency proceedings (A/CN.9/WG.V/WP.175)

A. General statements

19. The Working Group had before it a note by the Secretariat on civil asset tracing and recovery in insolvency proceedings (A/CN.9/WG.V/WP.175) and held an exchange of views on issues addressed therein. It noted that document A/CN.9/WG.V/WP.175 should be read together with the report of the Colloquium on Civil Asset Tracing and Recovery (Vienna, 6 December 2019) (A/CN.9/1008).

20. The importance of the project for preserving and maximizing the value of the insolvency estate for the benefit of creditors was emphasized. Practical difficulties faced by insolvency practitioners in tracing and recovering assets were noted, in particular in the era of digital trade, which required modernization of tools made available to insolvency practitioners to implement their roles as regards preservation and protection of the insolvency estate effectively and efficiently. The project was considered to be a natural extension of other insolvency projects of UNCITRAL.

B. Objective and nature of the project

21. It was considered that the objective of the project would be multifaceted, including educational and informational about the benefits of an effective asset tracing and recovery regime in insolvency proceedings and filling in existing gaps in jurisdictions that did not have experience with asset tracing and recovery in

[7] Ibid., para. 77 (the decision of the Commission, para. 4).
[8] Ibid., paras. 74 and 76 (d), (e) and (f).

insolvency proceedings. In addition, the effective asset tracing and recovery framework was considered to be a deterrent against the dissipation of assets.

22. Views differed on whether the project should purport to provide advice to insolvency practitioners (thus take the form of a practice guide) or to policymakers and legislators (thus take the form of a legislative guide, a model law or model legislative provisions). While some flexibility was expressed for a final product to take the form of either a practice guide or a legislative guide, a number of views suggested that it would be unfeasible to prepare a model law or another instrument that would try to achieve unification or harmonization of diverse legislative approaches to civil procedure aspects involved in asset tracing and recovery in insolvency proceedings.

23. It was considered desirable to take a toolbox approach in drafting a text, which would entail explaining different existing tools, including those found in UNCITRAL insolvency texts. Achieving an appropriate balance in presenting common law and civil law tools in a toolbox was considered important and helpful, in particular for enhancing understanding and potentially bridging differences between the tools as much as possible. It was suggested that preparing a text of an educational nature would ensure that any resulting toolbox would not be prescriptive and would respect the judicial sovereignty of States.

24. According to other views, it would be premature to decide on the form and nature of a text to be prepared. It was considered that the substance of the tools to facilitate and streamline asset tracing and recovery in insolvency proceedings should be developed first, which would allow consideration of whether guidance to legislators through legislative measures could be formulated. The role of the Commission in providing guidance on those matters was acknowledged.

C. Scope of the project

25. It was considered that the project, in the light of challenges that it raised and the broad spectrum of issues that it touched upon, as acknowledged by the Commission when the topic was referred to the Working Group,[9] should be limited in scope. It was recalled that the Commission had already agreed that, at the current stage, the scope would be limited to insolvency proceedings.[10] It was suggested that a broader approach would not be desirable since it would make the work excessively difficult given the various aspects involved in the topic. It was noted that a narrower approach would avoid duplication of work with other forums and UNCITRAL working groups. The Working Group nevertheless considered that addressing interfaces of insolvency proceedings with other areas of law would be unavoidable.

26. In particular, the view was expressed that the project should focus on the interplay of insolvency and civil procedure rules. Furthermore, although the common view was that the project would not deal with criminal law measures, an interplay between insolvency and civil procedure measures with criminal law measures was acknowledged. It was in particular noted that criminal law sanctions were usually imposed if insolvency or civil procedure rules were violated. In addition, with reference to paragraph 37 of document A/CN.9/WG.V/WP.175, it was recalled that insolvency representatives were assisted by criminal proceedings in some jurisdictions. It was also pointed out that asset tracing and recovery in insolvency proceedings might be triggered by criminal acts (e.g. fraud) committed before the commencement of or during the insolvency proceedings.

27. Although views differed on whether the project would cover enforcement of arbitral awards and judgments, it was suggested that the project could not avoid addressing those matters, in particular in the context of recovery of assets following avoidance or adjudication of disputed claims. Retaining flexibility in that respect was

[9] Ibid., para. 217.
[10] Ibid.

considered essential since many factors might influence the choice of a particular asset tracing and recovery tool, including recourse to arbitration or adjudication where necessary and justified by costs and other considerations.

28. Concerns were raised about including cross-border recognition aspects within the scope of the project. It was nevertheless acknowledged that the project could not be limited to purely domestic insolvency aspects in an interconnected world and it should therefore be expected that the project would address also the use of asset tracing and recovery tools in cross-border cases, including the commencement of secondary proceedings, coordination of concurrent proceedings and coordination and cooperation between and among courts and insolvency practitioners, as envisaged in the relevant UNCITRAL cross-border insolvency texts.

29. A cautious and gradual approach to any expansion of the scope of the project was advocated. In general, it was considered that the objectives of the insolvency law and existing UNCITRAL insolvency texts would establish appropriate boundaries to the project, which to be useful and understandable, should not become overly complex.

30. The Working Group acknowledged that a close interaction of the Working Group with other UNCITRAL working groups, in particular Working Group IV, as well as with Unidroit and the Hague Conference on Private International Law would be important in order to avoid unnecessary duplication of efforts and conflicting results. The Working Group heard statements of representatives of Unidroit and the Hague Conference on Private International Law to that effect. It also heard a view that the project was closely linked to the parallel project assigned to the Working Group, applicable law in insolvency proceedings, and should be closely coordinated therewith.

D. Elements for a text to be prepared

31. The secretariat was requested to compile provisions from UNCITRAL insolvency texts related to asset tracing and recovery, grouping them under those that are relevant to (a) provisional measures, (b) the identification of assets that belong to the estate, (c) tracing the assets, (d) recovering the assets, and (e) any ancillary tools. The resulting compilation was considered necessary for identification by the Working Group of any missing provisions in the best practice guidance already provided by UNCITRAL.

32. Providing an illustrative list of tools from both common law and civil law jurisdictions, grouping them under categories (a) to (e) listed in paragraph 31 above, was considered useful. It was acknowledged that document A/CN.9/WG.V/WP.175 and the report of the Colloquium had already referred to many such tools. It was considered that the powers of the insolvency representative to open secondary proceedings could be usefully added to that toolbox. It was also emphasized that some tools would depend on assets being traced and could be categorized accordingly (e.g. tools that are appropriate for immovable as opposed to movable property or tangible as opposed to intangible assets). Complexities arising from tracing financial assets and digital assets were particularly noted.

33. It was noted that some common law tools referred to in document A/CN.9/WG.V/WP.175 were of general application. It was suggested that the Working Group might consider in due course whether it would be necessary to adjust them to specifics of asset tracing and recovery in insolvency proceedings.

34. With reference to paragraph 49 of document A/CN.9/WG.V/WP.175, it was suggested that a text to be prepared by the secretariat could provide model clauses that would address the purpose of the tools and conditions and safeguards for their use. It was considered important to provide for safeguards for all affected persons, not only for the debtor and creditors. The need to protect trade secrets was particularly highlighted in the light of the nature of some envisaged asset tracing and recovery

tools. In the context of paragraph 49 (b) of document A/CN.9/WG.V/WP.175, it was considered important to elaborate on criteria that should guide the insolvency practitioner in its decision to commence asset tracing and recovery (e.g. costs and complexities involved, chances of success and fluctuating value of the asset being traced and recovered).

35. Recommendations 35 and 36 of the UNCITRAL Legislative Guide on Insolvency Law and recommendation 44 of the UNCITRAL Legislative Guide on Insolvency Law for Micro- and Small Enterprises finalized at the current session (see paras. 17 and 18 above) were considered to be the good starting points. It was suggested reinforcing them by provisions requiring the debtor to disclose information about its assets and any transfers of those assets that occurred within a period of time specified in law. In response, it was observed that, in some jurisdictions, such a disclosure obligation would arise only in the context of criminal proceedings. It was suggested that the project might usefully highlight the importance of different types of registries as well as the importance of providing unhindered access by insolvency practitioners to records contained therein.

Provisional measures

36. It was agreed that it would be essential, logical and compliant with approaches taken in UNCITRAL insolvency texts and domestic insolvency laws, to include in the project tools aimed at preventing dissipation of assets. It was considered that provisional measures, including the appointment of the provisional insolvency representative, were among such tools, which were especially valuable in case of involuntary insolvency and in jurisdictions where application for commencement of insolvency proceeding by the debtor did not trigger the automatic commencement of insolvency proceedings.

37. Complexities arising from the application of provisional measures and the need for appropriate safeguards against their abuse, such as limiting their duration, were noted. Reference was made in that respect to recommendations 39–45 of the UNCITRAL Legislative Guide on Insolvency Law that had already addressed those issues. It was suggested that those recommendations should be used as the starting point on the subject.

38. Consistent with the limited scope of the project, it was emphasized that the project would deal with provisional measures only as they related to insolvency proceedings. It was recalled that provisional measures were excluded from the scope of some international instruments, including the UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments (2018) and the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters. It was explained that, despite those exclusions, to the extent any overlap or conflict would arise, achieving consistency across various texts would be important.

39. It was suggested that the Working Group, during its work on the project, might decide to develop provisions on cross-border cooperation and coordination among courts and insolvency practitioners in the specific context of provisional measures granted during the interim period. It was considered that the 1997 UNCITRAL Model Law on Cross-Border Insolvency might not have sufficiently covered that aspect.

40. In subsequent discussion, it was clarified that definitions of “foreign proceeding” and “foreign representative” under the Model Law covered the interim proceedings and the interim representative. It was noted however that no interim proceeding might be commenced and no interim representative might be appointed between application for commencement of insolvency proceedings and commencement of insolvency proceedings. A view was expressed that, without aiming to amend any provisions of the Model Law or its Guide to Enactment and Interpretation in that respect, the Working Group could supplement those texts by a useful guidance that would focus on provisional measures and powers of provisional insolvency representatives and courts during that period.

41. In the light of high risks of dissipation of assets during that period, it was considered important to devise appropriate tools (e.g. in cross-border cooperation provisions of civil procedure law) that would: (a) empower provisional insolvency representatives as regards asset tracing and recovery actions across borders; and (b) authorize courts and insolvency practitioners to cooperate and coordinate with their foreign counterparts during that period. The utility of opening foreign proceedings was also acknowledged in that respect.

42. A view was expressed that, in the light of different approaches to provisional measures and their cross-border treatment across legal traditions and systems, a cautious approach to those issues would be justified. In subsequent discussion, the Working Group noted that the need to devise appropriate tools for cross-border cooperation and coordination among courts and insolvency practitioners might also arise after the closure of insolvency proceedings when asset tracing and recovery actions might still be ongoing and might inform the decision of the competent authority to reopen the proceeding and revoke the discharge granted.

43. The Working Group confirmed that policy choices made in recommendations 39–45 of the Guide remained valid, including as regards discretion given to the court to grant provisional measures envisaged in recommendation 39 of the Guide. Appointment of a provisional insolvency representative before an application for commencement of insolvency proceedings was suggested as a possible additional measure.

Cause of action, funding of actions and incentives for actions

44. The Working Group agreed that the approaches taken in recommendations 93 and 263 of the Guide would be valid in the asset tracing and recovery context. The commentary accompanying those recommendations was considered useful for understanding approaches taken in different jurisdictions to permitting individual actions by creditors, including outside the insolvency proceedings.

45. The Working Group heard examples of different incentives provided in domestic legislation to creditors to initiate asset tracing and recovery actions. Noting that there was no relevant recommendation in the Guide to build on in that context, a view was expressed that the project might usefully fill in that gap.

46. According to other views, the issue of creditors' involvement in asset tracing and recovery was controversial and its treatment required achieving a balance among various considerations. The objectives of equal treatment of creditors, maximization of the value of recovery for the benefit of all creditors and expeditious proceedings were recalled in that respect. The commentary to the relevant recommendations in the Guide that highlighted those various considerations was considered helpful.

47. While sharing those views, some delegations noted that permitting an action by creditor(s), subject to certain safeguards and as an exceptional measure, might be a better option than taking no action. It was suggested that safeguards could include disclosure requirements and oversight. It was considered that similar considerations would apply to the insolvency representative that would be accountable to the court and creditors for its asset tracing and recovery actions and would be required to disclose to them: (a) information about assets that the insolvency representative intended to trace and recover; (b) different options for tracing and recovering the assets; and (c) implications of each option.

48. Linked to that discussion was the discussion of alternative funding arrangements, including litigation funding, and selling rights to pursue actions to third parties. Recommendation 265 and the commentary thereto were considered to sufficiently cover those issues.

49. Acknowledging that not all tools would be acceptable in all jurisdictions, it was nevertheless considered that in the light of the educational purpose of the project, a variety of alternatives should be provided for consideration by interested jurisdictions and insolvency practitioners. Negotiated and mediated settlements were also

suggested as examples of additional alternatives. It was considered essential to subject all tools to safeguards, including transparency and inclusivity safeguards where and as appropriate.

Comments on document A/CN.9/WG.V/WP.175 and the report of the Colloquium (A/CN.9/1008)

50. It was noted that many terms found in the Glossary of the Guide would be helpful in the context of the project.[11] In addition, it was considered that the educational purpose of the project could be assisted by other recommendations of the Guide not mentioned in document A/CN.9/WG.V/WP.175.[12] Some of them were considered relevant for obtaining asset tracing and recovery orders from foreign jurisdictions (e.g. those that established the authority for the insolvency representative, provided background information about the proceeding and helped to compile the evidentiary record). Others were considered relevant for addressing dissipation of assets during the insolvency proceedings.

51. Criteria for categorization of tools in addition to those already mentioned during the session (see para. 31 above) were suggested, for example that tools could be categorized also as *ad personam* and *in rem* tools. The difficulty of bridging differences between them in the cross-border recognition context was emphasized. A view was also expressed that it would be helpful to categorize tools depending on whether they were used for tracing and recovering assets dissipated before, during or after the closure of the insolvency proceedings (e.g. during the implementation of the reorganization plan).

52. The following additional comments were made with respect to the issues raised in document A/CN.9/WG.V/WP.175: (a) jurisprudence with respect to the treatment of related persons in insolvency indicated the desirability of an open-ended definition of related persons; (b) it might be desirable to empower insolvency practitioners to have direct access to confidential or otherwise classified information although that might not be possible in some jurisdictions for data protection and other reasons; (c) where there were violations of provisional measures or the stay of proceedings upon commencement, effective sanctions, their enforcement and extraterritorial effect, played an important role, although some jurisdictions did not provide for such sanctions; and (d) some domestic laws provided for additional grounds for avoidance to those listed in recommendation 87 of the Guide.

53. It was considered that the protection of foreign companies outside their home jurisdictions should be among the goals of the project. It was noted that foreign companies faced several challenges when their assets were dissipated: (a) it was difficult to access information about associated foreign companies through which the company's assets could have been dissipated; (b) tracing and recovering assets were becoming more difficult with the use of modern techniques (such as fast delivery services and digital tools); (c) obtaining foreign recognition and enforcement of relief granted to foreign companies by domestic courts was difficult; and (d) viable alternatives to seeking foreign recognition and enforcement should be provided, for example collaboration of representatives of foreign companies with local stakeholders and access by shareholders of foreign companies to local remedies as civil parties. It was considered desirable to update the Guide as regards asset tracing and recovery tools so that States could use the updated text for improving their domestic legal framework.

[11] Specific references were made to terms (b), (c), (e), (h), (i), (l), (n), (t), (u), (v), (w), (bb), (ii), (rr) and (ss).

[12] References were made to recommendations 1, 5, 7 (a), (c), (d), (h), (i), (k) and (l), 8–16, 52, 55–61 together with their accompanying provisions explaining the purpose of the recommendations. Recommendation 256 of the Guide and recommendation 102 in the UNCITRAL Legislative Guide on Insolvency Law for Micro- and Small Enterprises finalized at the current session (see paras. 17 and 18 above) were also recalled as relevant.

E. Next steps

54. The Working Group noted that, while preparing a revised paper on the subject for consideration by the Working Group at a future session, the secretariat might add other terms and provisions and adjust categorization of tools. The need to preserve the secretariat's flexibility in its preparatory work was recognized.

55. In response to the views expressed during the session that asset tracing and recovery tools referred to in the report of the Colloquium and document A/CN.9/WG.V/WP.175 should be expanded, the Working Group noted the plans of the secretariat to circulate a request to States to transmit to the Secretariat information about additional asset tracing and recovery tools used by insolvency practitioners in insolvency proceedings in their jurisdictions. It was noted that an inventory of tools reflecting the inputs received from the States could be made available to the Working Group as early as its session in the second half of 2022.

VI. Consideration of the topic of applicable law in insolvency proceedings (A/CN.9/WG.V/WP.176)

A. General statements

56. The Working Group had before it a note by the Secretariat on applicable law in insolvency proceedings (A/CN.9/WG.V/WP.176) and held an exchange of views on issues addressed therein. The Working Group noted that document A/CN.9/WG.V/WP.176 should be read together with the report of the Colloquium on Applicable Law in Insolvency Proceedings (Vienna, 11 December 2020) (A/CN.9/1060).

57. The Working Group underscored the importance of the project, also noting its complexities. It was said that harmonizing applicable law in insolvency proceedings and reinforcing the application of the *lex fori concursus* would enhance legal certainty and predictability while preventing abusive forum shopping and reducing complexities and costs of insolvency proceedings. Views were expressed that a model law or model legislative provisions could be prepared building on recommendations 30–34 of the UNCITRAL Legislative Guide on Insolvency Law.

B. Approach to the project

58. The Working Group agreed with the approach to the project suggested in paragraph 2 of document A/CN.9/WG.V/WP.176. The common view was that the project should complement and be consistent with the existing UNCITRAL texts on insolvency law. Implications of the UNCITRAL cross-border insolvency texts on the project were noted. Another view was that the work of the Working Group should be limited to updating, if appropriate, recommendations 30 to 34 of the UNCITRAL Legislative Guide on Insolvency Law.

59. Views differed on appropriateness of transposing solutions found in one regional instrument to an UNCITRAL text. One view was that the instrument in question stood the test of time and many of its provisions were subject of an extensive case law, including at the regional level. The other view was that certain provisions of that instrument of relevance to the project were subject of extensive academic debate while issues arising from some other provisions had not yet been settled in the case law.[13] It was explained that some solutions found in that instrument might be explained by other provisions of that instrument, in particular those ensuring the automatic recognition of foreign proceedings and harmonizing rules for establishing

[13] Reference in that respect was made specifically to the words "shall not affect" found in article 8 of Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast) (the "EIR recast").

jurisdiction in cross-border insolvency cases. Historical and other factors that justified some provisions in that text of relevance to the project were also recalled.

C. Comments on recommendations 30–34 of the UNCITRAL Legislative Guide on Insolvency Law

60. The Working Group proceeded with the consideration of questions listed in paragraph 33 of document A/CN.9/WG.V/WP.176.

Recommendation 30

61. With reference to question (a), views differed on whether recommendation 30 required further elaboration. One view was that the recommendation was sufficiently clear, especially when it was read with its accompanying commentary and recommendations 3 and 4 of the Guide. The other view that the recommendation should provide more certainty and predictability in particular as regards rights *in rem*, choice of forum and directors' obligations. Concerns were expressed about the words "and effectiveness" found in the provision. Noting divergent views and connection of the recommendation to recommendation 31, the Working Group deferred further consideration of issues raised by that recommendation to a later stage.

Recommendation 31

62. With reference to questions (b) and (c), the Working Group considered first the meaning of the terms "insolvency law" and "insolvency proceedings" in the chapeau of recommendation 31. It subsequently considered possible amendments to an illustrative list of items contained in that recommendation.

Interpretation of the terms "insolvency law" and "insolvency proceedings"

63. In response to points raised in paragraphs 13–16 of document A/CN.9/WG.V/WP.176, wide support was expressed for interpreting the words "insolvency law" found in the chapeau of recommendation 31 as encompassing all laws with connection to insolvency as might be found in the State in which insolvency proceedings were commenced. It was considered sufficient to elaborate on such intended interpretation in any amended commentary to that provision that might be prepared in due course. In that context, a specific reference was made to company law provisions addressing directors' obligations and liabilities.

64. A view was expressed that it would be desirable to clarify the words "insolvency proceedings" found in the chapeau of recommendation 31. It was noted that the explanation of the term found in the Guide did not refer to interim measures, which was inconsistent with the definition of "foreign proceeding" found in article 2 (a) of the Model Law on Cross-Border Insolvency.

Amendments of items in the list

65. The Working Group considered the following amendments that received support:

(a) Adding reference to ipso facto clauses in item (h) or as a separate item;

(b) Opening item (i) with the words "treatment of", noting that the reasons for the inclusion of that item in the list were twofold: (i) set-off itself might not be an issue solely under insolvency law, as it might be linked to contract law and possibly rights *in rem*; and (ii) including the words "treatment of" would refine the point to the key issue of whether set-off would be allowed;

(c) With reference to item (j), various approaches with respect to the treatment of rights *in rem* in insolvency proceedings were noted. It was recalled that one of them, which subjected rights *in rem* to *lex fori concursus,* was criticized for impairing rights of secured creditors by establishing prevalence of *lex fori concursus* of a

jurisdiction that might have no or very distant connection to the transaction in question. It was noted that another approach, which insulated rights *in rem* from effects of any insolvency proceedings, was criticized for impairing any meaningful restructuring efforts, especially in the cross-border context. Finding a middle ground between those two approaches was suggested as a possible solution, for example subjecting rights *in rem* to the effects of insolvency law of *lex rei sitae*;

(d) Elaborating on item (n) by adding the following: "the claims which are to be submitted against the debtor's insolvency estate and the treatment of claims arising after the opening of insolvency proceedings", "the rules governing the submission, verification and admission of claims" and "creditors' rights after the closure of insolvency proceedings";

(e) Adding reference to directors' obligations and liabilities in line with part four of the Guide;

(f) Adding reference to "restructuring" or "restructuring law" as a separate item (alternatively, a commentary might explain that the term "insolvency law" or "insolvency proceedings" found in the chapeau provisions captured restructuring aspects).

66. The Working Group deferred consideration of issues arising from the treatment of digital assets, intellectual property rights and licences to a later stage (for the subsequent discussion of those issues, see para. 90 below). It heard that: (a) environmental aspects might also need to be brought within the scope of *lex fori concursus* in the light of the most recent developments as regards the treatment of environmental damages and liabilities in insolvency; and (b) it would be desirable to find solutions to issues arising from the lack of "equivalence" highlighted in paragraph 84 of the commentary.

67. Noting the default rule in the chapeau of recommendation 31, the illustrative list of items that followed that rule and the link of the recommendation with recommendations 32–34, it was suggested to refocus the deliberations to exceptions to *lex fori concursus*. In the light of the same considerations, views were expressed that the illustrative list of items should not become excessively long. It was considered necessary to draft recommendation 31 taking into account that *lex fori concursus* would not necessarily be *lex fori concursus* of the State where the centre of the debtor's main interests (COMI) would be located. Another view was that the Working Group should review the list in recommendation 31 at a future session and determine whether or not to expand it.

Conclusion

68. Recalling that it was agreed at the current session to interpret the term "insolvency law" broadly (see para. 63 above), which was in line with the approach taken also when the UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments was prepared, it was considered that the need to amend further the list in recommendation 31 should not arise. It was also considered that interim proceedings and any other pre-insolvency proceedings with sufficient connection to insolvency would be covered by recommendation 31.

69. After clarifying that reference to COMI was unnecessary in recommendation 31 and having considered in subsequent discussion some additional issues of relevance to recommendation 31 (see paras. 78, 80 and 81 below), the Working Group concluded the current stage of consideration of issues raised by recommendation 31.

Recommendations 32 and 33

70. With reference to question (d), the Working Group agreed to address recommendations 32 and 33 separately.

Recommendation 32

71. The Working Group considered that, in the light of developments in financial markets and digitization of financial systems, the content of the recommendation would have to be updated. Relevant provisions of more recent international texts were recalled,[14] noting inconsistencies between them and the recommendation and the need to eliminate those inconsistencies in due course.

72. On the understanding that those aspects would be addressed at a later date, the Working Group concluded the current stage of consideration of issues raised by recommendation 32.

Recommendation 33

73. The Working Group heard the approach taken in one regional instrument to labour contracts.[15] It was suggested that the same approach could be taken in the recommendation, which would mean replacing the word "may" with the word "shall" or "should".

74. On the understanding that the application of the *lex contractus* in insolvency proceedings would be the most efficient way to protect employees' rights and ensure legal certainty, support was expressed for the suggestion to replace the word "may" with the word "should".

75. The other view was that the word "may" in that recommendation might provide for more flexibility in choosing better protection for employees. With the goal to offer employees the best protection possible, some support was expressed for a solution that would make *lex fori concursus* applicable unless *lex contractus* offered a better protection to employees, and vice versa. It was, however, noted that the suggested approach could necessitate a time-consuming and complicated comparison of different protection regimes. It was recalled in that respect that employee protection regimes could include mandatorily applicable law that would address such matters as the priority ranking of employee claims and minimum payment guarantees.

76. In subsequent discussion, while agreeing that employees should receive sufficient protection, a view was expressed that achieving the right balance between the interests of employees and interests of other stakeholders involved in insolvency was also important. For those reasons, in addition to legal certainty, the word "shall" was preferred.

77. Noting divergent views and the need to reconcile them at a later date, the Working Group concluded the current stage of consideration of issues raised by recommendation 33.

Recommendation 34

78. With reference to question (e), a view was expressed that the commentary to recommendations 30–34 did not explain clearly why exceptions to *lex fori concursus* did not encompass avoidance, set-off and security interests. A close link of those provisions with recommendation 32 was noted.

79. The Working Group heard views on desirability of: (a) including additional exceptions to *lex fori concursus*; (b) confirming the effects of *lex fori concursus* on arbitral proceedings; (c) clarifying the interplay of *lex fori concursus* of the State of the opening of the insolvency proceeding with *lex fori concursus* or *lex processus* of a recognizing State under the UNCITRAL Model Law on Cross-Border Insolvency; and (d) imposing conditions on the application of *lex fori concursus* in some cases.

80. As regards including additional exceptions to *lex fori concursus*, a view was expressed that they would be justified in the light of articles 28–32 of the UNCITRAL

[14] The Unidroit Principles on the Operation of Close-Out Netting Provisions and Principle C10.4 of the World Bank Principles for Effective Insolvency and Creditor/Debtor Regimes.

[15] The EIR recast, article 13.

Model Law on Enterprise Group Insolvency. The Working Group considered that consideration of such possible exceptions should be deferred to a later stage in line with the agreed step-by-step approach.

81. As regards the impact of *lex fori concursus* on arbitral proceedings, it was noted that UNCITRAL legislative texts did not address that issue explicitly. In the light of the role of arbitration in international trade, it was considered important to fill in that gap, building on the relevant commentary already found in UNCITRAL insolvency texts, such as the commentary to article 20 of the UNCITRAL Model Law on Cross-Border Insolvency. Support was expressed for that suggestion.

82. As regards the interplay of *lex fori concursus* of the State of the opening of the insolvency proceeding with *lex fori concursus* or *lex processus* of a recognizing State under the UNCITRAL Model Law on Cross-Border Insolvency, reference was made to article 24 of the UNCITRAL Model Law on Cross-Border Insolvency that authorized the foreign representative, upon recognition of a foreign proceeding and subject to the requirements of the recognizing State, to intervene in any proceedings to which the debtor is a party. The Working Group noted practical difficulties arising from the application of that provision because of divergent treatment across jurisdictions of the debtor after commencement of insolvency proceedings. It was considered necessary to clarify whether it was *lex fori concursus* of the State of the opening of the insolvency proceeding or *lex fori concursus* or *lex processus* of a recognizing State that would prevail with respect to power of attorney and other relevant issues.

83. As regards imposition of some conditions on the application of *lex fori concursus*, approaches in one regional instrument[16] and the main reason for taking them (protection of legitimate expectations of parties to transactions) were explained. The Working Group was invited to consider those approaches for an UNCITRAL text.

84. In response, it was noted that some of them were subject to debate, would not be workable at the global level and might be unnecessary in the light of the UNCITRAL insolvency framework. A view was expressed that the Working Group should proceed cautiously when considering any deviations from policy choices made by UNCITRAL when it adopted recommendations 30–34; any such deviations would need to be justified with reference to real needs and the objective of simplifying applicable law rules in insolvency proceedings.

85. It was in particular questioned whether protection of legitimate expectations of parties to transactions would be a valid concern in all instances. The situation captured in recommendation 33 was contrasted to situations where it was unreasonable to assert that business parties would not have anticipated effects of *lex fori concursus* on their commercial transactions.

86. In response to the views that the suggested approaches would also protect against the application of unreasonable law, views differed on whether applicable law rules could or should in fact be formulated with such a consideration in mind. Some considered that the observed convergence of substantive insolvency rules facilitated by the UNCITRAL Legislative Guide on Insolvency Law made the application of *lex fori concursus* less problematic. It was recalled, for example, that the UNCITRAL Legislative Guide on Insolvency Law imposed a stay on enforcement of security rights subject to a possible relief under justified circumstances and subject to protection against diminution of the value of the collateral. Additional safeguards found in the UNCITRAL cross-border insolvency texts, such as public policy exceptions and provisions calling for the adequate protection of the interests of the creditors and other interested persons, were also considered relevant. A view was expressed that the Working Group might consider strengthening such safeguards, if necessary, in due course. Addressing practical difficulties arising from imposition and enforcement of a stay of proceedings across borders, for example on secured creditors

[16] References were made to articles 9 (set-off), 16 (avoidance) and 11 (treatment of immovable property) of the EIR recast.

with respect to the collateral located abroad or arbitral proceedings taking place abroad, was in particular considered necessary.

87. Other suggestions with respect to the text included that: (a) the third sentence of paragraph 23 of document A/CN.9/WG.V/WP.176 raised important issues that should be appropriately treated in a legislative provision rather than only in a commentary or the drafting history; and (b) reference to the "insolvency law" in recommendation 34 should be reconsidered since exceptions to *lex fori concursus* could be found also in the law other than insolvency law.

88. The Working Group concluded the current stage of consideration of issues raised by recommendation 34, noting that many issues merited further consideration. The need to take a gradual, cautious and thorough approach to those issues was emphasized.

Other issues with respect to recommendations 30–34

89. With respect to (f), it was considered sufficient for a commentary in a future text to note additional issues that might arise from the application of applicable law rules in reorganization as opposed to liquidation.

90. With respect to (g), it was considered that the need for a public policy exception would depend on the form of an instrument to be prepared. While views differed on whether such an exception should be included in the Guide in the context of its applicable law provisions, the common view was that it would be necessary to include it in a stand-alone legislative text on the topic but would be unnecessary to do so in an annex to existing UNCITRAL model laws in the area of insolvency law since the model laws already contained such an exception. It was noted that, where it was included, the usual UNCITRAL approach was to construe it narrowly. Noting that the form of a future instrument on the topic was not yet agreed upon, the Working Group deferred further consideration of the issue to a future session.

91. With respect to (h), the Working Group recalled that earlier during the session it had deferred consideration of issues arising from the treatment of digital assets, intellectual property rights and licences in insolvency proceedings to a later stage (see para. 66 above). Noting that validity and effectiveness of rights to those assets would be captured by recommendation 30, the Working Group agreed that, as noted in footnote 67 of document A/CN.9/WG.V/WP.176, no need for an exception to *lex fori concursus* with respect to those assets would arise. In the light of specifics of those assets (in particular, difficulties with their localization and establishing jurisdiction), it was considered useful to reinforce the application of *lex fori concursus* to them as part of the debtor's insolvency estate.

D. Next steps

92. Views differed on the form of an instrument to be prepared on the topic. A convention, a model law, model legislative provisions, an annex or supplement to existing UNCITRAL cross-border insolvency model laws or amended recommendations 30–34 of the Guide were mentioned as possible options.

93. Preparing an annex or a supplement to existing UNCITRAL cross-border insolvency model laws was supported because it was considered that an instrument to be prepared on the topic would have a private international law rather than a substantive domestic insolvency law nature. Other delegations considered that preparing a stand-alone text would be a better option. Yet another view was that updating relevant parts of the Guide would be sufficient and efficient, in particular because that approach would alleviate the need for the Working Group to work on more than one text and to reconcile possible inconsistencies between a separate text and recommendations 30–34 and their accompanying commentary in the Guide. Other delegations were flexible as regards the idea of commencing work on amendment of recommendations 30–34 and their accompanying commentary, provided that aspects

of UNCITRAL cross-border insolvency model laws would be properly reflected in that work. Some delegations considered that updating recommendations 30–34 and their accompanying commentary should not be the focus of the work on the topic.

94. Noting that it was premature to consider the form of a future instrument before the agreement was reached on substantive points, it was suggested to defer the consideration of that aspect. The other view was that the eventual form of an instrument would influence approaches to drafting a Secretariat paper for consideration by the Working Group at its future sessions, noting complexities that had arisen in the past when proximity of initial drafts and the final text were not ensured from the outset. Another suggestion was to consider general principles first, as was done when the UNCITRAL Model Law on Enterprise Group Insolvency was prepared.

95. Confirming the agreement reached at the current session to take a step-by-step approach to the project and in the light of unresolved issues as regards the form of a future instrument and its content, the Working Group left flexibility to the secretariat to decide on how materials reflecting deliberations on the topic at the current session should be presented to the Working Group for its consideration at a future session. It was confirmed that the Working Group's consideration of the topic at the next session was expected to be limited to issues related to the first stage of the project, as described in paragraph 2 of document A/CN.9/WG.V/WP.176.

VII. Other business

96. The Working Group noted the dates, place and preliminary arrangements for its sixtieth session. Noting that States' responses to the request to transmit to the Secretariat information about additional asset tracing and recovery tools used by insolvency practitioners in insolvency proceedings in their jurisdictions (see para. 55 above) were expected to be received by the Secretariat later in 2022, a suggestion was made to allocate most time at the next session of the Working Group for consideration of the topic of applicable law in insolvency proceedings and one day for consideration of the topic of civil asset tracing and recovery. The understanding was that the requested secretariat's compilation of existing provisions from UNCITRAL insolvency texts related to asset tracing and recovery (see para. 31 above) would form the basis of consideration of the topic of civil asset tracing and recovery in insolvency proceedings at the next session of the Working Group. The Working Group invited delegations to submit papers and proposals for consideration of both topics and noted the secretariat's plans to submit updates to the Judicial Perspective for review by the Working Group before they were transmitted to the Commission for approval.

97. The Working Group heard statements of relevance to other agenda items. In particular, as relevant to agenda item 3, the Working Group heard a statement about sanctions envisaged in the UNCITRAL Legislative Guide on Insolvency Law for Micro- and Small Enterprises finalized at the current session (see paras. 17 and 18 above). Noting that the focus of the statement was on criminal law matters outside the mandate of UNCITRAL, the Working Group confirmed the finalization of the UNCITRAL Legislative Guide on Insolvency Law for Micro- and Small Enterprises at the current session, recalling also the relevant deliberations and the decisions of the Commission at its fifty-fourth session, in 2021.[17] With respect to other issues covered by that statement, it was noted that they had already been raised during the session and would be appropriately reflected in the draft summary of the session. As relevant to agenda item 4, the Working Group heard a suggestion that, to avoid delays in insolvency proceedings, a separate procedure outside the insolvency proceedings and the insolvency law might be devised for civil asset tracing and recovery in insolvency proceedings.

[17] *Official Records of the General Assembly, Seventy-sixth Session, Supplement No. 17* (A/76/17), paras. 53–77 and annex II.